To the Supreme Court of the United States:

The WASHBURN & MOEN MANUFACTURING COMPANY, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Worcester in said Commonwealth, petitions for a writ of *certiorari* to be directed to the United States Circuit Court of Appeals for the First Circuit, to bring before this Honorable Court the case of the WASHBURN & MOEN MANUFACTURING COMPANY *v.* THE RELIANCE MARINE INSURANCE COMPANY (LIMITED), numbered 156 in said Court.

Your Petitioner respectfully alleges: —

First, That your Petitioner was and is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts.

Second, That The Reliance Marine Insurance Company (Limited) was and is a corporation duly organized and existing under the laws of the Kingdom of Great Britain and Ireland, and having a usual place of business in Boston in said Commonwealth of Massachusetts.

Third, That on September 27, 1893, the said Washburn & Moen Manufacturing Company brought a suit in the Superior Court for the County of Suffolk in said Commonwealth of Massachusetts against the said The Reliance Marine Insurance Company on a policy of marine insurance issued by it in the sum of forty-eight thousand, eight hundred dollars ($48,800), on a cargo of barbed wire laden on board the Schooner "Benjamin Hale"; said cargo being valued in said policy at forty-eight thousand, eight hundred dollars ($48,800); and said insurance being issued against perils of the sea and other perils therein mentioned.

Fourth, That said suit was returnable in the Superior Court for the County of Suffolk on the first Monday of November, A.D. 1893. That on November 24, 1893, upon petition of the said The Reliance Marine Insurance Company (Limited), the said cause was removed to the Circuit Court of the United States in and for the District of Massachusetts; and on the same day a bond was given by said Insurance Company. That thereupon said cause was entered in said Circuit Court on the May Term, A.D. 1894, being the next term of the said Circuit Court after said cause was removed thereto.

Fifth, That thereafter the said cause came on for trial in the United States Circuit Court for the District of Massachusetts, and was tried before the Honorable William L. Putnam, Circuit Judge, on June 14, 1895. That at the trial of said cause the plaintiff proved the following: —

That on March 15, 1893, the Washburn & Moen Manufacturing Company took out a policy of marine insurance in The Reliance Marine Insurance Company (Limited) of London, England, in the sum of forty-eight thousand, eight hundred dollars ($48,800), on a cargo of wire from Boston to Galveston and or Velasco, Texas, on the said Schooner "Benjamin Hale," the said wire being valued at the sum insured, the rate of premium being one and one-fourth (1¼) per cent, and amounting to the sum of six hundred ten dollars ($610), which premium was paid in cash by the plaintiff.

The policy contains the following clause stamped upon it in red ink, being what is known as a "rider," viz: —

"Free of particular average, but liable for absolute total loss of a part if amounting to five (5) per cent."

Copy of policy, Record, p. 107, Exhibit 1.

The said Schooner "Benjamin Hale," with the insured cargo on board, sailed from Boston in a good seaworthy condition, on March 31, 1893, bound to Velasco, Texas.

On April 15, 1893, the vessel ran ashore on Bahama Bank and threw overboard about two hundred reels of barbed wire, which resulted in the schooner floating and proceeding on her voyage On April 19, 1893, the schooner ran ashore on Bird Key, near Dry Tortugas, and at once filled with water and sank.

Record p. 20.

On April 22, 1893, the master went on a packet to Key West, where he arrived on Saturday, April 23 in the evening. On Monday, April 24, he sent a telegram to the Washburn & Moen Manufacturing Company. At the time that he sent the telegram he thought that the vessel and all the cargo on board was a total loss.

Record, p. 21.

This telegram is found on page 117, Exhibit 8, and is as follows: —

"April 24, 1893. Hale ashore, Tortugas. Full water. Badly broken up. Think total loss. John Hall."

On April 24 or the next day, Daniel N. Bates, representing the plaintiff, called at the office of Mr. Poole, the agent of the defendant company in Boston, told him what he knew in regard to the trouble and offered to abandon the cargo to the underwriters.

Record, p. 25.

That afterwards he consulted counsel in the case, and as a result of that interview a letter of abandonment was sent to the agent of the defendant company, in which was enclosed a bill of lading and a copy of the invoice, which had been received in the meanwhile.

This letter of abandonment was written because Mr. Bates was told by his counsel that in the ordinary Boston form of marine insurance policy there was a clause requiring an abandonment to be made in writing and he did

not have the policy with him at the time. The letter of abandonment was written on April 29.

See Record, p. 111, Exhibit 2.

The policy in the case at bar was not in the Boston form, so that an oral abandonment was sufficient.

After the abandonment to the defendant company the Washburn & Moen Manufacturing Company never exercised any control or management of the property whatsoever. The written offer of the Washburn & Moen Manufacturing Company to abandon was replied to by Mr. Poole, agent of the Insurance Company. The reply will be found in Record, p. 115, Exhibit 6.

On April 24 the master of the said Schooner "Benjamin Hale," in company with the underwriter's agent who represented the Insurance Company, proceeded to the vessel, which was floated by wreckers on May 2 and brought to Key West. She arrived at Key West, May 4, full of water, and was discharged on May 10, 1893.

Record, p. 21.

At Key West libels were filed in the United States District Court by a number of salvage claimants against both the vessel and cargo for saving the same, separate libels being filed by the different sets of salvors. Under these libels for salvage the vessel was sold and the cargo was bonded by persons acting under the direction and in behalf of the Reliance Marine Insurance Company (Limited), which company also employed counsel to defend the salvage suits. These salvage suits were heard together, and a decree was entered against both vessel and cargo, the decree against the cargo amounting to the sum of nine thousand, three hundred ninety-three and fifteen one-hundredths dollars ($9,393.15), which sum, together with the expense of defending the suit and the expense of taking care of the cargo at Key West, was paid by the Reliance Marine Insurance Company (Limited). The sum paid in the Registry of the Court was nine thousand, three hun-

dred ninety-three and fifteen one-hundredths dollars ($9,393.15), together with the sum of eleven hundred dollars ($1,100),

Record, pp. 53 and 57,

in all the sum of ten thousand, four hundred ninety-three and fifteen one-hundredths dollars ($10,493.15).

In addition to the above there was paid by the defendant Company four hundred eighty-five dollars ($485.) to the agent to look after and protect the cargo at Key West, making the total expense of saving the cargo and putting it in a place of safety at Key West, the sum of ten thousand, nine hundred seventy-eight and fifteen one-hundredths dollars ($10,978.15).

The Schooner "Benjamin Hale" was sold by the U. S. Marshal under an order issued in the salvage suits, and her voyage was abandoned on or about June 15, 1893.

None of the owners purchased the vessel at the sale.

Record, p. 59.

Captain Hall, her master, left the Schooner "Benjamin Hale" on June 10, 1893, and proceeded to Boston, having no intention of returning, and leaving no person in charge of her as master; the vessel at that time being in charge of the U. S. Marshal under an attachment and an order issued for her sale.

After the arrival of Captain Hall in Boston, at the request of the underwriters on the cargo, and at their solicitation, he signed a charter-party of the Schooner "Cactus" to carry the cargo from Key West to Velasco, and the cargo was loaded on board of the Schooner "Cactus" under the supervision of the general and special agent of the underwriters.

This charter-party was made after the sale of the "Benjamin Hale," and while the cargo was in a place of safety at Key West. The Schooner "Cactus" completed her loading on June 28, 1893, and proceeded to Velasco, Texas, where she arrived on July 14, 1893, and duly reported as

ready to discharge cargo to the agent of the Washburn & Moen Manufacturing Company at that port, which agent, under instructions from his principals, refused to accept the cargo, and thereupon the master of the "Cactus" libelled the cargo for both freight and demurrage and sold the same; the cargo being purchased at that sale by a third party for the sum of ten thousand dollars ($10,000).

Record, p. 69.

The charter-party of the Schooner "Cactus," which is found on page 120, Exhibit 10, of the Record, differs from the original charter-party of the "Benjamin Hale," Exhibit 7, page 116 of the Record, in the following particulars: —

The rate of freight is the same from Key West to Velasco as from Boston to Velasco. In the charter of the "Benjamin Hale" no time is fixed for the loading or discharging of the cargo, whereas it is specified in the charter of the "Cactus" that she shall load in seven running days and that she shall discharge at Velasco in five running days. The loading of the cargo was done under the supervision of the underwriters, Captain Hall having left the vessel and leaving no one in charge of her or the cargo except the agent of the underwriters. Before the charter of the Schooner "Cactus," which was made in Boston, the captain had abandoned the voyage.

Under the said charter-party of the "Cactus" the rate of demurrage was fifty dollars ($50) per day, and the "Cactus" was delayed in loading the cargo at Key West three and one-half (3½) days, causing a demurrage in the sum of one hundred seventy-five dollars ($175), all of which accrued prior to the schooner leaving Key West; and in Velasco the delay in discharging was fifteen and one-half (15½) days, making the amount of the charter, together with the demurrage, the sum of three thousand, one hundred forty-eight and fifty-four one-hundredths dollars ($3,148.54).

The Washburn & Moen Manufacturing Company were

not told of the charter of the Schooner "Cactus," nor were they in any way informed of the action that was being taken by the defendant company in forwarding the cargo to Velasco, Texas, although they were within easy communication of the defendant, and the property at Key West was in a place of safety.

When the Schooner "Cactus" left Key West, there was a charge for one hundred seventy-five dollars ($175) demurrage on the cargo, and seven hundred dollars ($700) more freight to be paid upon arrival at Velasco than if the cargo had been carried there by the Schooner "Benjamin Hale."

Upon the arrival of the Schooner "Cactus" at Velasco, the master of the "Cactus" libelled the cargo for freight and demurrage and sold the same, leaving a balance in the Registry of the Court, after paying his claim of costs and expenses, five thousand, three hundred sixty-nine and twenty-three one-hundredths dollars ($5,369.23).

This charter-party of the "Cactus" was entered into by the defendant Insurance Company without any request on the part of the Washburn & Moen Manufacturing Company, and without their knowledge.

The jury found in this case by a special finding that there was a constructive total loss of the cargo by perils insured against.

Evidence was introduced by the plaintiff that the cost of saving the property and landing it at Key West was more than the value of the property at Key West.

Evidence was introduced by the plaintiff that the cost of saving the property and forwarding it to the port of destination was more than the value of the property at the port of destination.

There was no question about the abandonment being seasonable, and no question but that the loss insured against exceeded fifty per cent of the value of the cargo.

The judge of the Circuit Court ruled that there was not sufficient evidence to warrant a jury in finding that there was a constructive total loss by reason of the clause in the policy "free of particular average."

The Court, although requested by the plaintiff, declined to allow the case to go to the jury on any ground, ruling, —

(1) That there was not sufficient evidence to warrant a jury in finding that there was an absolute total loss.

(2) That there was not sufficient evidence to warrant a jury in finding that there had been an acceptance of the abandonment.

(3) Ruling that the plaintiff could not go to the jury on a question as to whether or not there was a total loss, either absolute or constructive.

To each and all of which rulings and refusals to rule, the plaintiff duly excepted; the exceptions being found on pages 128 to 131 on the Record.

Sixth, Thereupon the plaintiff applied for a writ of error to the United States Circuit Court of Appeals for the First Circuit, which writ was granted and filed, and at the same time filed its Assignment of Errors, which is found on page 133, and incorporates in substance the instructions prayed for by the plaintiff, which were refused at the trial of the case.

These Assignments of Error were as follows: —

1. In not allowing the case to go to the jury on the question as to whether or not there was a constructive total loss.

2. In not allowing the case to go to the jury on the question as to whether or not there was an absolute total loss.

3. That the Court erred in not ruling that it was a question of fact for the jury as to whether there were such acts done and instructions given by the defendant, its servants and agents, as amounted to an acceptance of the abandonment.

4. That the Court should have ordered on the whole evidence in the case a verdict for the plaintiff for the amount sued for.

5. That the Court should have ruled that the sale of the cargo at Velasco, Texas, under judicial process, deprived the plaintiff of the property, and made a total loss of the cargo under the policy.

6. That the Court should have ruled that if by reason of the perils insured against there was damage or loss to the property insured in excess of fifty per cent of its value as given in the policy, and that an abandonment was duly made before the property was in a place of safety, the plaintiff could recover a total loss.

7. That the Court erred in not allowing the case to go to the jury on the question as to whether or not there was a total loss either absolute or constructive.

8. That the Court erred in not allowing the case to go to the jury on the question as to whether or not the defendant had accepted the abandonment of the cargo made by the plaintiff.

In the case at bar the Washburn & Moen Manufacturing Company was prevented from going to the jury on the question as to whether or not there was a total loss under the policy, and this was the error complained of. The other errors refer simply to different phases of the same question, which were duly presented to the Court at the trial of the case.

Seventh, It was the contention of the plaintiff in the Circuit Court and said Circuit Court of Appeals that there was sufficient evidence to warrant a jury in finding that the Insurance Company was indebted to them under the policy to the full amount of the same, and for the following reasons: —

I. That there was evidence sufficient to warrant a jury in finding that there was an absolute total loss of the property.

II. That there was sufficient evidence to warrant a jury in finding that there was an abandonment duly made, and

an acceptance of the abandonment on the part of the defendant company.

III. That the Circuit Court should have ruled that the plaintiff was entitled to recover for a constructive total loss under the policy.

IV. That there was a loss of property by judicial process for which the defendant company was liable.

Eighth, That said case came on to be heard, and was heard before the said United States Circuit Court of Appeals for the First Circuit on November 18, 1895, before the Hon. L. B. Colt, Circuit Judge, Thomas L. Nelson and Nathan Webb, United States District Judges, and on September 7, 1897, said Court filed an opinion, a copy of which is found in the Record, affirming the ruling of the Circuit Court.

Ninth, In said opinion the said Circuit Court of Appeals found that in the State Court of Massachusetts where this suit was originally brought, the plaintiff could recover for a constructive total loss under the facts here presented; but the Court further found that the Supreme Court of the United States had adopted a different rule, and that the said Circuit Court of Appeals felt bound by such opinion. That said Court did not attempt to pass on the question as to whether or not there was an absolute total loss under the terms of the policy, and no mention is made in the opinion on that point. The said Court also found that there was not sufficient evidence to warrant a jury in finding that the defendant by its acts accepted the abandonment.

Tenth, Thereupon the plaintiff filed in said Circuit Court of Appeals a petition for re-hearing, asking that certain questions of law be certified to this Honorable Court for its opinion, which petition, a copy of which is found in the Record, was denied by said Circuit Court of Appeals on November 1, 1897.

Eleventh, The plaintiff claims that the contention that the case at bar has been decided by the decisions of this Honorable Court is not warranted by the decisions. That under the decisions of the highest Court in England in a case like the one at bar, the plaintiff could recover for a total loss. That there was sufficient evidence to warrant a jury in finding that there was an absolute total loss.

Twelfth, That a writ of *certiorari* should issue in this case on the following grounds:—

1. That the finding of the Court is contrary to the rule of law existing in the Commonwealth of Massachusetts, and is so stated in the opinion.

2. That the decision of the Circuit Court of Appeals is different from the law as stated by the Supreme Court of the United States on the question of what amounts to an acceptance of abandonment.

3. That the decision of the Circuit Court of Appeals is contrary to the rule of law laid down in England on all questions presented before it.

4. That the Circuit Court of Appeals in its decision states a different rule of law than is stated by any other Court.

5. That the case presented is one of great importance to the commercial community.

6. That the construction of the policy of insurance herein stated should be uniform in the different circuits and districts of the United States.

7. That the decisions which the said Circuit Court of Appeals rely on do not sustain the position assumed by said Court in its opinion.

8. That the contract which is made in Massachusetts by a Company doing business therein, should be construed according to the law and usage of that State.

WHEREFORE, your Petitioner prays that a writ of *certiorari* may be granted by this Honorable Court in the above

entitled cause to the United States Circuit Court of Appeals for the First Circuit.

WASHBURN & MOEN MFG. CO.,
WM. E. RICE, *President.*

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, SS. WORCESTER, November 6, 1897.

I hereby certify that on the 6th day of November, A.D. 1897, before the subscribed, a Notary Public duly qualified, personally appeared WM. E. RICE, President of the WASHBURN & MOEN MANUFACTURING COMPANY, and made oath that the matters and facts contained in the foregoing petition are true as therein set forth, to the best of his knowledge, information and belief.

WITNESS my hand and Notarial Seal the day and year above written.

[SEAL] CHARLES RANLET,
Notary Public.

I, Eugene P. Carver, duly admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for a writ of *certiorari* and in my judgment from the matters stated therein the writ ought to issue.

EUGENE P. CARVER.